In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1391

JOSEPH JEROME SCALISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue presented by the petition is whether a trial judge may charge the jury on aiding and abetting when the indictment makes no reference to that basis for criminal liability.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of unlawfully receiving and possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659, and was sentenced to imprisonment for eight years. The court of appeals affirmed (Pet. App.).

The pertinent evidence is set forth in the opinion of the court of appeals. It shows that ten days after a truckload of Sears Roebuck merchandise was stolen while in interstate commerce, police officers in Oak Park, Illinois, discovered a parked van containing cartons

bearing the Sears label. They observed petitioner drive up to the van and discharge his passenger, who then entered the van and drove it off, with petitioner following closely behind. When the officers attempted to intercept the van, petitioner maneuvered his vehicle to block them. After a short chase, the van turned off the road and was stopped. The driver was arrested, and a Sears Roebuck catalogue containing petitioner's fingerprints was found on the right front seat. The merchandise in the van proved to be part of the stolen shipment.

At trial, on request of the government, the district judge in his closing charge gave the standard instruction on aiding and abetting (Pet. 6). While conceding that every court of appeals that has passed on the question has ruled against his position (Pet. 7), petitioner nevertheless urges that the giving of an aiding and abetting instruction when the indictment does not refer to the aiding and abetting statute, 18 U.S.C. 2, violates traditional notions of fairness and expands the indictment by allowing the jury to premise its conviction upon an alternate theory which may not have been consistent with a theory of guilt as a principal.

Initially, we note that petitioner can only speculate as to the jury's basis for conviction, since there was ample ground to convict petitioner of violating 18 U.S.C. 659 independently of the aiding and abetting theory. In any event, petitioner's argument fails; it has long been held that "all indictments for substantive offenses must be read as if the alternative provided by 18 U.S.C., §2 were embodied in the indictment." *United States* v. *Megna*, 450 F. 2d 511, 512 (C.A. 5); *United States* v. *Lester*, 363 F. 2d 68 (C.A. 6), certiorari denied, 385 U.S. 1002. See also *Nye and Nissen* v. *United States*, 336 U.S. 613; *United States* v. *Washington*, 287 F. 2d

819, 820-821 (C.A. 7), certiorari denied, 366 U.S. 969. Thus, the giving of an aiding and abetting instruction does not expand an indictment which may not contain an explicit reference to 18 U.S.C. 2.

Contrary to petitioner's contention (Pet. 8-9), the giving of the instruction did not conflict with the presumption of knowledge of the stolen character of the goods from proof of possession. The presumption instruction requires an initial determination that petitioner had possession. The aiding and abetting instruction was to the effect that even if petitioner had no possession of the stolen goods, he could still be convicted if he willfully and knowingly aided and abetted another who did knowingly possess contraband (Pet. 5-6). Accordingly, the instructions and the theories of guilt were not inconsistent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.